FILED
MAY 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-1310

NO. A-904

SAM DEAN,

*Petitioner*

—VS—

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporaton,

*Respondent*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

Respondent prays this court shall enter an order dismissing the petition for a writ of certiorari in this cause, or in the alternative, shall enter an order denying the petition for a writ of certiorari to review the decision of the Court of Civil Appeals of Alabama.

## OPINIONS BELOW

The petitioner correctly reports the decision of the Court of Civil Appeals of Alabama (*The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 829), and also the denial, without opinion, of the petition for certiorari to the Supreme Court of Alabama (*The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 834), but ac-

cording to the notification received by the attorneys for the respondent from the Clerk of the Supreme Court of Alabama, the application for rehearing directed to the Supreme Court of Alabama was denied on November 29, 1972, and not November 30, 1972, and a copy of the notification from the Clerk of the Supreme Court of Alabama to the attorneys for the respondent is attached hereto as appendix "A". This discrepancy is material to this Court's consideration of the merits of the motion to dismiss asserted by the respondent to the petition for writ of certiorari.

## JURISDICTION DENIED

This court is without jurisdiction to entertain the petition for a writ of certiorari because the application therefor was not filed within the time allowed by the provisions of Title 28, Section 2101 (c), United States Code Annotated, nor was an order of this court extending the time within which to file a petition for writ of certiorari obtained within the time allowed by Title 28, Section 2101 (c), United States Code Annotated. The filing of a petition seeking an extension of time within which to file a petition for a writ of certiorari was not in compliance with the provisions of the United States Supreme Court Rule No. 34 (2), and the order of Justice Powell entered on March 1, 1973 granting the requested extension of time to petitioner was made more than ninety days from the denial of the application for a rehearing directed to the Supreme Court of Alabama.

## THE QUESTIONS PRESENTED

(1) Did the petitioner make application for a writ of certiorari in this court within the time allowed by the provisions of Title 28, Section 2101 (c), United States Code Annotated, and in accordance with the provisions of the United States Supreme Court Rule No. 22 (4) and United States Supreme Court Rule No. 34 (2)?

(2) Is the decision of the Court of Civil Appeals of Alabama declaring the provisions of Title 30, Section 7 (1), Code of Alabama 1940 (Recompiled 1958) in accord with the applicable decisions of this court?

## REASONS FOR DENYING THE WRIT OF CERTIORARI

The time within which the petition for a writ of certiorari must be presented to this court is within ninety days after the entry of such judgment or decree in the state appellate court having last asserted jurisdiction in the cause. Applying the provisions of United States Supreme Court Rule No. 34 (1) in computing the expiration of ninety days from the actual date of the denial of the motion for a rehearing by the Supreme Court of Alabama dictates that a petition should have been filed in this court on or before February 7, 1973. Any motion of petitioner under the provisions of United States Supreme Court Rule No. 34 (2) seeking an extension of time to file such a petition should have been filed on or before February 17, 1973. It is without dispute that the order of Justice Powell granting an extension of time within which to file the petition for a writ of certiorari in this court was not made and entered until after the expiration of ninety days, and contravenes the provisions of Title 28, Section 2101 (c), United States Code Annotated. Respondent takes issue with those averments of the motion seeking an extension of time wherein the filing of a petition for a writ of certiorari in this court was delayed because of the inaction of the Attorney General of Alabama in making known his wishes regarding the review of this matter in this court. The Attorney General of Alabama appeared amicus curiae in the Court of Civil Appeals of Alabama in support of the validity of the provisions of this Alabama statute, and was surely aware of the decisions rendered by the Court of Civil Appeals of Alabama and also the Supreme Court of Alabama.

The respondent respectfully submits that the petition for a writ of certiorari in this cause should now be dismissed because not filed in time.

An examination of the provisions of Title 30, Section 7 (1), Code of Alabama 1940 (Recompiled 1958), demonstrates that both from a legal and practical standpoint, there are many inequities which render it in violation of the provisions of the Fourteenth Amendment of the United States Constitution.

First, the statute requires that an "employee", upon exhibiting his summons to his superior, shall be excused from his "employment", but notwithstanding his absence, is entitled to his "usual compensation", less the amount received as jury pay. These terms are not defined and one is forced to speculate on who is an "employee" and what is "usual compensation" from "employment". In respondent's business operation, stenotype operators, pressmen, and other union members are paid "wages" as that term is usually applied, i.e. an hourly rate of pay. Other employees for respondent, such as news reporters, office personnel, janitors, secretaries, etc., are paid on a salary basis, per week or per month, while delivery of respondent's newspapers is done by "independent contractors" who purchase newspapers from the respondent and offer these newspapers for resale with a margin of profit for themselves. To which of these persons does the statute apply? Respondent suggests that even a broad definition of "employee" would cover only wage earners and salaried personnel within the protection of the statute, and therein lies a part of the discriminatory effect of the statute. For example, consider the situation in which a trial court of this state called one of the employees of respondent who is paid on an hourly basis, and another who earns his living as a life insurance agent, whose sole income depends upon the commissions received by him from the sale of policies by him. Since both respondent and the life insurance company depend upon the

work product of their respective workers, each has theoretically suffered the same loss, i.e., work product of one worker for the period of jury duty. But respondent's monetary loss does not end there, however, for in addition to the loss of a worker for the period of time during which he or she is serving as a juror, the respondent may be required to hire a temporary replacement or pay overtime to another worker and at the same time respondent will be required to pay the absent worker a portion of his or her wages though nothing is received by respondent in return. The life insurance company, on the other hand, only has an agent whose compensation is actually paid by those to whom he sells his policies so that all that the life insurance company has lost is its agent's time. Manpower loss has been the same to both the respondent and the insurance company, but the economic loss suffered by this respondent is far greater.

This respondent or any other employer claimed to be subject to the provisions of this statute do not exercise any control over the selection of those persons selected for jury duty and it is within the realm of possibility that more than one employee of the same business concern could be summonsed for jury duty during the same period of time. One can readily see the impact of this statute upon the business man who operates his shop, candy store, news stand, barber shop, etc., with only one or perhaps two employees as compared to those large business concerns having large numbers of employees. The employee performing jury duty loses nothing, even though he or she contributed nothing to his or her employer during that same period of time, and quite possibly could even cost his or her employer additional wages for replacement workers or for overtime compensation. Suppose the "boss" is called for jury duty. Who pays him? His business may lose, and certainly will not gain, from his fulfillment of his duty to serve the court system of his state or nation, yet

he cannot recapture that loss, for unfortunately he has no "employer" to call upon for monetary reimbursement. The same situation applies to the farmer, the professional man or woman, and the self-employed. Each may be called for jury duty with only the one occupying the privileged classification of "employee" receiving his regular compensation, while the other will only receive the statutory jury pay afforded by the existing state statutes. Like parties in like circumstances and conditions, have by virtue of the provisions of Title 30, Section 7 (1) received unequal treatment, and under no standards imaginable can this be said to constitute equal protection under the laws. Those fortunate enough to fall within the classification of the statute are rewarded for jury service, while the independent, self-employed citizen suffers, yet both persons did exactly the same service under the same or similar conditions. The real and obvious discrimination is readily apparent by considering the practical application of this statute, and is nothing more than an unwarranted attempt to shield one segment of the community from economic loss for serving as a juror while at the same time unduly burdening private industry. A classification permitted under the due process and equal protection guaranties of the federal constitution must of itself be reasonable and not arbitrary, and must be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and there must be uniformity within the class. *Praker City Cab Company vs. Pennsylvania*, 277 U. S. 389, 48 Supreme Court 553, 72 Lawyer's Edition 927.

Whatever evil was sought to be corrected by the enactment of Title 30, Section 7 (1) has at best been only partially satisfied, and this partial satisfaction has resulted in an unreasonable and arbitrary burden on those who come within the classification of an employer. On the other hand, the employee has suffered a windfall by which he may

receive a much more handsome fee for serving on a jury than does his self-employed neighbor. The Alabama Legislature has, in effect, placed an indirect tax upon employers to support the judicial system in this state. If this statute is held constitutional, what is to prevent the next legislature from completely abolishing any payment by the state to persons who serve as jurors thus throwing the entire expense of this vital governmental function upon private employers? A discriminatory and oppressive character of this statute is flagrant, and if jurors deserve more pay for their service, it is the duty of the State of Alabama, whom they serve, to provide the additional revenue through revenue raising measures applicable to all without discrimination.

The apparent intent of this statute is to relieve certain members of the public from some of the financial burdens which normally accompany jury service. This is a noble endeavor but to saddle another group of citizens with the cost of relieving this burden is unconscionable. Jury service is a public duty, and one's tenure as a juror is for a public use and a public purpose. To require of this respondent and other similarly situated employers to compensate these persons for jury service, without some benefit or compensation therefor, amounts to nothing less than the taking of private property for public use without just compensation. Whatever evil the enactment sought to correct, the cure is worse than the disease, for though many are favored, many are penalized. Private property, in the form of forced compensation with no return consideration or benefit, is being taken from employers to support, directly or indirectly, what has long been a public use and charge. This property of employers is not only taken without just compensation, but without any compensation whatsoever. Before the enactment of this statute, all jurors in Alabama serving the state court system were poorly paid, but now, thanks to this enactment, those jurors whom the legislature

chose not to favor are poorly paid. Taking of this property is by authority and with approval of the state, and though not denominated as a tax, a more appropriate label escapes the imagination.

In *Rinaldi vs. Yeager*, 384 U.S. 506, 86 Supreme Court 1497, 16 Lawyer's Edition 2d 577, this Court reiterated that the Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes, because it also imposes a requirement of some rationality in the nature of the class singled out, and a further requirement that there must be some relevance to the purpose for which the classification is made. This Court is not apprised by the petitioner in brief of the relevance of this statute as to the classification of employers in general. The Alabama Legislature now seeks to do by legislative fiat what has heretofore been the subject matter of negotiated contracts of employment between employers and labor unions. Petitioner asserts that the state of Alabama has a legitimate interest in insuring that trials be conducted before jurors which represent a true cross-section of the community, and secondly, in seeing that economic hardship is not cast upon prospective jurors who are compelled by law to leave work and serve as jurors. It is extremely doubtful whether or not this statute would remedy, either or both, of these noble aims. If one accepts the premise that a true cross-section of the community is only those people who work for wages, then this purpose is served. But the fallacy of this argument is demonstrated when one considers that a true cross-section of the community also includes self-employed persons, housewives, farmers, professional people, retired persons and other similarly situated persons who are not gainfully employed for wages by a private employer. To the assertion that the economic hardships of jury service should not be imposed on those who by serving on jury service forfeit all or a portion of their wages leaves one to wonder why the legislature does not simply increase

the rate of compensation paid to jurors for jury service rather than seeking to impose a tax on the business segment of the community. If the constitutionality of this statute is upheld, then what is to prevent the Alabama Legislature from next enacting a statute requiring that the salary of any public official who is elected shall be paid by his former employer because the state desires to attract a true cross-section of the community as public officers without economic hardships to the individual office holder.

Such legislation would apply to "all" employers which is a classification which the petitioner contends is a reasonable nondiscriminatory classification to support the validity of Title 30, Section 7 (1). Nor will the mere reduction in the income of an employer constitute a constitutional infirmity as claimed by petitioner in brief. One can readily see there is no end to the imposition of punitive legislation against employers if the provisions of Title 30, Section 7 (1) withstands the scrutiny of this Court in the light of the safeguards of the Fourteenth Amendment.

Respondent respectfully submits that the analogy which the petitioner draws between the "pay-while-voting" statutes and the "jury-pay" statute is erroneous. The purpose of the Missouri pay-while-voting statute was "designed to end the coercion of employees by employers in the exercise of the franchise" of voting. *Day-Brite Lighting vs. Missouri*, 342 U.S. 421, 72 Supreme Court 405, 96 Lawyer's Edition 469. The purpose of the Alabama statute as determined by the Court of Civil Appeals of Alabama was "to insure those rendering service to the state received adequate compensation", with the issue being who shall be called upon to pay this compensation. *The Gadsden Times Publishing Corporation vs. Dean*, 268 So.2d 829 (832). There can be little similarity between a voter who desires to take a few hours or perhaps a full day off from the duties of his employment to a juror who may be required to sit in attendance for a trial lasting days or weeks or months.

Perhaps the type legislation with which we are herein concerned is that of which Justice Jackson spoke in his dissent in the Day-Brite case when he mentioned state imposed terms of employment. The validity of a "pay-while-voting" statute was denied by the Court of Appeals of Kentucky in the case of *Illinois Central Railroad Company vs. Commonwealth*, 305 Kentucky 632, 204 Northwestern 2d 973. This Court declined to grant certiorari in that case. *Illinois Central Railroad Company vs. Commonwealth*, 334 U.S. 843, 68 Supreme Court 1511, 92 Lawyer's Edition 1767. A like result of unconstitutionality was reached by the Supreme Court of Illinois in the case of *Heimgaertner vs. Benjamin Electric Manufacturing Company*, 6 Illinois 2d 152, 128 Northeastern 2d 691 involving a pay-while-voting statute.

The only other jurisdiction which has had occasion to consider the constitutional validity of a jury-pay statute is the Supreme Court of Hawaii in the case of *Hasegawa vs. Maui Pineapple Company*, 475 Pacific 2d 679, which case is cited as persuasive authority by the Court of Civil Appeals of Alabama in its decision. The argument is advanced by amicus curiae that there is a distinction between the Hawaii statute and the Alabama statute because the Alabama statute only concerns pay to jurors while the Hawaii statute pertains both to jurors and public board members. No such distinction between the recipients of economic benefits was mentioned by the Hawaii Court, and the issue of constitutionality under both the Hawaii and Federal Constitution was resolved against the statute.

> "Increasing he civic responsibility of citizens and ensuring that those who serve their community do not suffer economic deprivation are undoubtedly goals which serve a high and benevolent purpose under our representative form of government. It is not the role of this court to debate the wisdom of those policies. However, it is the duty of this court to see that the legislature does not seek to achieve noble ends by un-

constitutionally arbitrary means. The statutory discrimination must be based upon differences that are reasonably related to the purpose of the law. Morey vs. Doud, 354 U.S. 457, 465, 77 Supreme Court 1344, 1 Lawyer's Edition 2d 1485 (1957). Specifically, in the case at hand, we must ask what is the 'ground of difference having a fair and substantial relation to the object' of this legislation which justifies the legislature in imposing on private employers this special burden of compensation? Allied Stores of Ohio vs. Bowers, supra 358 U.S. at 527, 79 Supreme Court 437.

. . . .

In the Day-Brite case the Missouri legislature had determined that employers as a class were using their power over their employees' wages to coerce them to vote as they directed. Day-Brite Lighting, Inc. vs. Missouri, supra at 421, 72 Supreme Court 405. In order to remedy this evil the statute prohibited employers from deducting wages while their employees absented themselves from work to vote. However, in the present case the purpose of HRS Section 388-32 is not to prevent employer coercion of employees in the exercise of their franchise, but rather to ensure that those rendering services to the State receive adequate compensation. At issue is the reasonableness of the legislative decision as to who shall be called upon to pay this compensation.

Those furnishing their services to juries and public boards and commissions are, in effect, part-time public employees; yet in seeking to increase their compensation, the state legislature did not assess the general public through apportioned taxation. Instead it chose to make a class distinction, imposing the economic cost of remuneration solely on private employers. The State has not demonstrated any special benefit to private employers that would justify this class distinction. Absent such a showing their is no rational basis for singling out this group from the general populace in seeking to achieve legislative purpose of HRS Section 388-32.

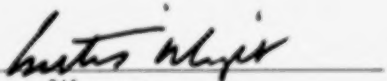
> The general public acting through its elected representatives has assumed the financial and administrative responsibility of having juries and public boards and commissions. These public functions, like the provision of police and fire protection, benefit all who live in the community. The cost of a proper state function conducted for the public benefit cannot be arbitrarily charged to one class in the society. (Authorities cited) There is nothing in the position of private employers within our society which places them in a relationship to these public institutions different from the relationship of the general public to them. Therefore, we hold that by imposing liability for the cost of juries and public boards and commissions on private employers HRS Section 388-32 works an invidious class distinction in violation of the equal protection clauses of both the Hawaii and Federal Constitutions.
>
> . . . .
>
> The right of the state to exercise its police power and right of taxation in the public interest is limited by the constitutional principle that private property shall not be taken for public use without just compensation. In effect, this principle affords the same protection against unreasonable and arbitrary government action that is found in the equal protection clauses. Thus, although the police power permits the state to regulate the use of an individual's property in order to protect the public health, safety and welfare, such regulation has its limits. If it goes too far it will be recognized as a 'taking' requiring the individual affected to receive just compensation. Pennsylvania Coal Company vs. Mahon, 260 U.S. 393, 415, 43 Supreme Court 158, 67 Lawyer's Edition 322 (1922)."

Likewise the Court of Civil Appeals of Alabama held that the Alabama Legislature had gone beyond the limits allowed by the Fourteenth Amendment to the United States Constitution and a similar result should be reached by this Court by a denial of further review.

## CONCLUSION

For the reasons set forth above, respondent respectfully requests that an order should be entered dismissing the petition for a writ of certiorari because the petition was not timely filed, and if this contention be without merit, then respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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## PROOF OF SERVICE

I, Curtis Wright, of the law firm of Dortch, Wright & Ford, attorneys of record for The Gadsden Times Publishing Corporation, a corporation, respondent herein, depose and say that on the 11 day of May, 1973 I served copies of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to the Court of Civil Appeals of Alabama on each of the several attorneys of record hereto as follows:

1. The Honorable Thomas E. Davis of the law firm of Burns, Carr, and Shumaker, Attorneys of Record for Sam Dean, petitioner herein, by placing three copies of said brief in the mail, postage prepaid and properly addressed to the Honorable Thomas E. Davis of the law firm of Burns, Carr and Shumaker, 821 Chestnut Street, Gadsden, Alabama, 35901.

2. The Honorable L. G. Kendrick, Assistant Attorney General for the State of Alabama, Attorney for amicus curiae, State of Alabama, by placing three copies of said brief in the mail, postage prepaid, and properly addressed to the Honorable L. G. Kendrick, Assistant Attorney General, Office of Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama, 36104.

3. The Honorable Sidney Dickstein of the law firm of Morin, Dickstein, Shipiro and Galligan, of counsel for petitioner herein, by placing three copies of said brief in the mail, postage prepaid, and properly addressed to the Honorable Sidney Dickstein of the law firm of Morin, Dickstein, Shipiro and

Galligan, 800 Federal Bar Building West, Washington, D.C., 20006.

Curtis Wright

Subscribed and sworn to before me,
this the 11th day of May, 1973.

Notary Public — State of Alabama at Large

## APPENDIX A

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: SC 132

EX parte: Sam Dean
Re: Gadsden Times
Publishing Corp. VS. Sam Dean
*Appellant* *Appellee*

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____) Petition for Writ of Certiorari denied. No opinion.
____) Submitted on briefs
____) Appellant granted additional time to file transcript of record to and including
XX ) Application for rehearing overruled
____) Appell____ granted 15 additional days to file briefs to and including
____) Appell____ granted 15 additional days to file reply briefs to and including
____) Transcript filed (Notice under Rule 12)
____) Permission to file amicus curiae briefs granted
____) Permission to make additional assignments of error granted.
____)

/s/ J. O. SENTELL
Clerk, Supreme Court of
Alabama

November 29, 1972